SUPREME COURT, U. S.

DEC 22 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 896

LOUIS MAZES,

Petitioner,

v.

STATE OF OHIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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LOUIS MAZES,

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STATE OF OHIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered on July 13, 1966, which affirmed Petitioner's conviction of possessing and offering for sale an obscene book. Motion for Rehearing was denied September 28, 1966.

OPINIONS BELOW:

The opinion of the Court of Appeals of the First Appellate District, Hamilton County, Ohio, is reported at 209 N.E.2d 496, and printed herein at Appendix page 1.

The opinion of the Supreme Court of Ohio is reported at 7 Ohio St. 2d 136, and printed herein at Appendix page 7.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section ~~2101~~ 1257(3), and Part V of the Rules of this Court.

QUESTIONS PRESENTED

The Constitutional questions to be presented by this Petition for Writ of Certiorari, all of which were presented to the trial court and argued on appeal to the Supreme Court of Ohio, are as follows:

(1) Is the book in question, "Orgy Club," protected by the First Amendment to the Constitution of the United States of America as material having literary merit and which is not utterly without redeeming social value in its expression of a detective novel theme and idea, when the literature is not patently offensive?

(2) Did the procedures followed in obtaining the conviction in the trial court offend the First Amendment to the Constitution of the United States of America and deny the Petitioner due process of law and a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America, when no testimony or evidence was presented by the State of Ohio, or permitted from the Petitioner, of contemporary community standards of tolerance in literature, or of quality, or quantity, of literary merit and socially redeeming theme or ideas.

(3) Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a book dealer, charged with possession and offering for sale an alleged obscene book, without proof of the dealer's knowledge of the alleged obscene content of the literature, when the book is not patently offensive.

CONSTITUTIONAL PROVISIONS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS

The Petitioner, Louis Mazes, is an operator (R. 156-158) of a newsstand, candy and tobacco store in the City of Cincinnati. The business has been operated by the Petitioner, and his father before him, for approximately 40 years in the same location and is considered by the community in which it is located as an established institution of good reputation. On October 1, 1963, the Petitioner was convicted of possessing an obscene book, titled "Orgy Club."

This prosecution commenced on November 7, 1962, when several officers of the Vice Control Bureau, City of Cincinnati Police Department entered the Petitioner's bookstore, which was open to the public for business. One of the police officers took the book "Orgy Club" from an open book rack where it was on display, read the fly leaf and excerpts from about four pages chosen at random (R. 9-11, 31), and thereupon seized the book as contraband (R. 15), and arrested the Petitioner for possessing an obscene book. The book "Orgy Club" was on display on an open rack bearing a sign, "You must be Twenty-One years old" (R. 8-9). The Petitioner was indicted by the Grand Jury and after denial of the Petitioner's Demurrer to the Indictment and Motion to Suppress Evidence the cause proceeded to trial on September 18, 1963. The prosecution did not attempt to prove what were the community standards of tolerance in comparable literature but relied solely upon evidence of the way the book was displayed and seized, following which the book was read aloud to the jury over several trial days (R. 39). Proof of the ownership of the business premises by the Petitioner was adduced (R. 46, 51), and no further evidence as to alleged lack of redeeming social importance, community standards, dominant theme of the material or its appeal to prurient interests was attempted before the prosecution rested (R. 61). The Petitioner's Motion for Dismissal was denied (R. 65-72), and thereafter the Petitioner attempted to introduce testimony relating to contemporary community standards (R. 73-81), in relation to propriety of written depiction, and levels of candor in description of sexual episodes in modern day fiction. The Court refused to allow introduction of any other comparable reading material. The Petitioner introduced a witness who qualified as an expert in the field of literature (R. 81), who testified that the dominant theme of the book "Orgy Club" was not an appeal to prurient interests but rather was one of literary merit, being a standard "Private Eye" type of detective story with a level of candor in depicting sexual episodes not as frank as the levels of

candor currently tolerated in the community in comparable novels (R. 92, 118-123). The Petitioner also testified in his own defense and specifically indicated that he had no particular recollection of the very existence of the book "Orgy Club" (R. 163, 164), until the police officers had seized it (R. 176), and that the Petitioner did not select the book (R. 159-161), and did not have any knowledge of the contents of the vast majority of the thousands of assorted books that came into his store (R. 158). Further he testified that the price of the book "Orgy Club" was in the ordinary range of paper back books. The driver for the wholesaler who supplied the Petitioner, exclusively (R. 225), testified as to the mode of delivery and selection of books and their assembly on the racks in Petitioner's store (R. 227), including the ownership of the racks and shelves which were solely within the control of the supplier (R. 230). Several character witnesses testified as to the good reputation and propriety of the Petitioner and his business operation (R. 191, 196, 199, 201, 204, 210, 219, 225). On rebuttal the prosecution introduced a professor of psychology (R. 247), who gave his opinion regarding the prurient interests of the book "Orgy Club," reading excerpts of the book to the jury. The Petitioner then introduced a psychiatrist, on surrebuttal (R. 293), who testified as an expert on prurient interests of the average person and whose opinion was that the book "Orgy Club" would not appeal to the prurient interests of the average person (R. 301, 302). Following the closing of all of the testimony the Petitioner again moved for dismissal of the indictment, which Motion was denied by the trial court (R. 243). In its charge to the jury the lower court limited the definition of obscenity to the effect of the material judged by local community standards and without consideration as to whether or not the book "Orgy Club" contained any socially redeeming ideas or literary merit. There was no consideration by the Court of any question that the book "Orgy Club" must be patently offensive to be adjudged obscene. The jury returned a finding of Guilty and judgment was entered accordingly.

The Petitioner appealed to the Court of Appeals, First Appellate District of Hamilton County, Ohio, which court affirmed the judgment on April 7, 1965. Thereafter, Petitioner appealed to the Supreme Court of Ohio which court affirmed his conviction on July 13, 1966. Petitioner's Motion for Rehearing was denied by the Supreme Court of Ohio on September 28, 1966.

REASONS FOR ISSUING THE WRIT

QUESTION ONE

Is the book in question, "Orgy Club," protected by the First Amendment to the Constitution of the United States of America as material having literary merit and which is not utterly without redeeming social value in its expression of a detective novel theme and idea, when the literature is not patently offensive?

After even a cursory perusal of the text of the novel "Orgy Club" it must appear obvious that the principal question involved in this appeal should be, "How did the Supreme Court of the State of Ohio ever adjudge this novel to be obscene?" Petitioner does not contend that the novel "Orgy Club" is of Pulitzer Prize caliber but it is a bona fide detective novel, comparable to the Mickey Spillane and Raymond Chandler works. This Court has, while reversing in *Memoirs v. Massachusetts*, 383 U.S. 413, reiterated the proposition that literature must be *utterly* without redeeming social values, or ideas, to be stripped of its Constitutional immunity from prosecution (383 U.S. at 418-420):

> "We defined obscenity in *Roth* in the following terms: 'Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the

material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

* * *

"The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book can not be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. Hence, even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard."

This proposition was by no means novel, having been set forth by this Court in *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, at p. 1507:

"All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests...."

This proposition was repeated in *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793, at p. 800:

"We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,' and that 'the portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' *Id.*, at 484, 487, 1 L ed 2d at 1507, 1508. It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp. v. Regents*, 360 US 684, 3 L ed 2d

> 1512, 79 S Ct 1362, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. See *Zeitlin v. Arnebergh*, 59 Cal 2d 901, 920, 383 P2d 152, 165, 31 Cal Rptr 800, 813 (1963). It should also be recognized that the *Roth* standard requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such matters'...."

The only testimony presented to the trial court on this point, in the instant case, was offered by the Petitioner (R. 81, 89, 92, 118-123), and that testimony was to the effect that the novel "Orgy Club" contained an expression of a detective novel theme and idea, and was within comparable community standards of tolerance in literature. The trial court did not take into consideration the total lack of patent offensiveness of the novel "Orgy Club." The alleged obscene passages, which supposedly depict acts of sexual intercourse (R. 257-258), fall far below the descriptions of similar events contained in comparable literature, and do not render this novel patently offensive. These alleged sexual depictions appear upon pages 20 and 21, 33 and 34, 68 and 69, 90 and 91, and 104-105. The textual material of "Orgy Club" consumes a total of 123 pages. By no stretch of the imagination should this novel be considered as patently offensive. The photograph of the female, appearing on the front cover of the book does not even reveal the model's mammary glands and is more innocuous than a Marilyn Monroe pin-up calendar portrait. A comparison of this novel "Orgy Club" with such Mickey Spillane and Raymond Chandler novels as "The Big Sleep," "I the Jury" and "My Gun Is Quick" demonstrates the patent inoffensiveness of "Orgy Club." The excerpts appearing in bold print on the fly leaf and back cover could not render this novel to be obscene; this novel must be considered as a whole, not by isolated

passages, *Roth v. United States, supra.* The manner in which this book was displayed, in offering it for sale in the Petitioner's book store, on a rack under a sign which stated, "You must be twenty-one years old," certainly distinguishes this case from the opinions of this Court in the cases of *Ginzburg v. United States*, 383 U.S. 463, at 467, 468, 470,

> "Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers'. . . .
>
> "The 'leer of the sensualist' also permeates the advertising for the three publications. The circulars sent for EROS and Liaison stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded an unrestricted license allowed by law in the expression of sex and sexual matters. . . .
>
> "This evidence, in our view, was relevant in determining the ultimate question of 'obscenity' and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. . . ."

and *Mishkin v. New York*, 383 U.S. 502, at 504-505, 508,

> "Appellant was not prosecuted for anything he said or believed, but for what he did, for his dominant role in several enterprises engaged in producing and selling allegedly obscene books. Fifty books are involved in this case. They portray sexuality in many guises. Some depict relatively normal heterosexual relations, but more depict such deviations

> as sado-machoism, fetishism, and homosexuality. Many have covers with drawings of scantily clad women being whipped, beaten, tortured, or abused. Many, if not most, are photo-offsets of typewritten books written and illustrated by authors and artists according to detailed instructions given by the appellant. Typical of appellant's instructions was that related by one author who testified that appellant insisted that the books be 'full of sex scenes and lesbian scenes . . . . [T]he sex had to be very strong, it had to be rough, it had to be clearly spelled out. . . . I had to write sex very bluntly, make the sex scenes very strong. . . . [T]he sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men. . . . [H]e wanted scenes in which women were making love with women. . . . [H]e wanted sex scenes . . . in which there were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men making love to men, and there were spankings and scenes—sex in an abnormal and irregular fashion.' Another author testified that appellant instructed him 'to deal very graphically with . . . the darkening of the flesh under flagellation . . . .' Artists testified in similar vein as to appellant's instructions regarding illustrations and covers for the books.
>
> "Where the material is designed for and primarily disseminated to a clearly defined deviant and sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. . . ."

There was no attempt by the Petitioner to pander this literature; there was no advertising intended to appeal to any particular deviant group, as sadists, masochists or any fetishism. This analysis returns to the original question, "Upon what basis did the Supreme Court of the State of Ohio hold this book to be obscene?" The only remaining element which may have swayed the court is the title "Orgy Club." Petitioner asserts that this is a descriptive title since the hero of the novel, Judson Belt, did encoun-

ter such an establishment in his travels on route to apprehending the murderer. This excursion was an integral part of the plot enmeshed in the detective theme of this novel.

The First Amendment to the Constitution of the United States of America must crumble into ashes and be blown away by the wind to permit an obscenity conviction to stand upon the offensiveness of the title of a work of fiction. Thereupon, this Court, in considering the alleged obscene materials, *Jacobellis v. Ohio, supra,* at p. 799,

> "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

should declare the novel "Orgy Club" to be protected by the First Amendment to the Constitution of the United States of America as material having literary merit, which is not utterly without socially redeeming value in its expression of a detective novel theme and idea, and further that this novel could not be declared obscene since it is not patently offensive and it conforms with contemporary community standards of tolerance in literature.

QUESTION TWO

Did the procedures followed in obtaining the conviction in the trial court offend the First Amendment to the Constitution of the United States of America and deny the Petitioner due process of law and a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America, when no testimony, or evidence was presented by the State of Ohio, or permitted from the Petitioner, of contemporary community standards of tolerance in comparable material, or of quality, or quantity, of literary merit and socially redeeming theme or ideas?

In the trial court, the State of Ohio did not attempt to prove what were the community standards of tolerance in contemporary literature but relied solely upon evidence of the way the book "Orgy Club" was displayed and seized following which the novel was read aloud to the jury by the prosecutor (R. 39). The Petitioner moved the court to direct the jury to return a verdict of not guilty, which motion was denied (R. 65-68). The Petitioner could have rested upon these motions and probably obtained a reversal of his conviction, *Klaw v. United States*, 350 F.2d 155; *United States v. Davis*, 353 F.2d 614 (Judge Waterman's dissent); *Memoirs v. Massachusetts*, 383 U.S. 413 (Mr. Justice Douglas, concurring). The Petitioner thereafter attempted to introduce testimony relating to contemporary community standards, in relation to the levels of candor in description of sexual episodes in modern day fiction (R. 73-81). The court refused to allow the introduction of any other reading material, which the Petitioner attempted to introduce through the testimony of a librarian and a college professor of literature (R. 75-79, 116) and a psychiatrist (R. 298-299). The trial court thereby denied the Petitioner a fair trial, and due process of law, in violation of Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States of America, concurring opinion, Justice Harlan, *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205, at 220, 221, 222:

> "Proof of scienter may entail no great burden in the case of obviously obscene material; it may, however, become very difficult where the character of the material is more debatable. . . .
>
> "This means that, regardless of the elements of the offense under state law, the Fourteenth Amendment does not permit a conviction such as was obtained here unless the work complained of is found substantially to exceed the limits of candor set by contemporary community standards. The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process—'using

that term in its primary sense of an opportunity to be heard and to defend [a] . . . substantive right,' *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 US 673, 678, 74 L ed 1107, 1112, 50 S Ct 451—requires a State to allow a litigant in some manner to introduce proof on this score. . . .

"Appellant attempted to compare the contents of the work with that of other allegedly similar publications which were openly published, sold and purchased, and which received wide general acceptance. . . ."

The jury could only base their decision upon their individual standards and taste, being totally uneducated, at least so far as this Record indicates, as to the nation wide community standards of tolerance, *Jacobellis v. Ohio, supra*, at 802:

"It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but is is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines,' *Pennekamp v. Florida, supra*, 328 US, at 335, 90 L ed at 1298; we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in *Roth* to the effect that the con-

stitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding."

These experts were qualified to testify on this subject and the court should have received the exhibits to broaden the jurors' limited knowledge and experience; concurring opinion, Justice Frankfurter, *Smith v. California, supra,* at 217, 218:

> "The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity—a right implicit in the very nature of the legal concept of obscenity—to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or the incompetence of experts to testify to such matters. The two reasons coalesce, for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patentability of a controverted device.
>
> "There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States,* 354 US 476, 489, 1 L ed 2d 1498, 1509, 77 S Ct 1304,

> it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards'. . . ."

The court, in its charge to the jury (R. 331-333, App. pp. 11-30), instructed upon the definition of obscenity and followed with,

> "You will see in applying this test that the test of obscenity is not subjective, but objective. It is not to be judged by what any certain individual might deem to be obscene, or what a particular group of individuals might consider to be obscene, but rather what the community as a whole, the average person in that community would consider to be obscene."

There was no admonition to the jury that the community standard to be applied would be the national community standards, not merely the standards of Hamilton County, Ohio. There was no instruction to the jury relating to any quantum of literary merit, or its quality. Under the instructions given by the court the jury was left in a vacuum ignorant of the Constitutional protection afforded to literary material which advocates ideas, even ideas which may be contrary to prevailing public opinion, *Roth v. United States, supra,* at p. 1507

Thereupon this Court should declare that the procedures followed in the trial court offended the First Amendment to the Constitution of the United States of America in permitting material with literary merit to be adjudged obscene, without consideration of the national community standards of tolerance. This Court should declare that the Petitioner was denied due process of law and a fair trial, when the trial court prohibited the Petitioner from introducing examples of literature for the

jury's consideration and education, to establish the national community standard of tolerance in literature and thereby denied the Petitioner his rights as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States of America.

QUESTION THREE

Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a book dealer, charged with possession and offering for sale an alleged obscene book, without proof of the dealer's knowledge of the alleged obscene content of the literature, when the book is not patently offensive?

In the trial of this case the State of Ohio offered testimony from the arresting police officer (R. 42-46), to the effect that the Petitioner placed the novel "Orgy Club" on the rack marked, "You must be twenty-one years old," for sale to the public. This was the only testimony offered by the State to prove that the Petitioner even knew that this particular book was in his store, along with approximately three thousand other paper back novels, pocket books and magazines. The Petitioner testified that he does not select the material placed in his store by his distributor (R. 159-161), and that the distributor's route salesmen are responsible for placing the novels upon the book racks (R. 163-164), and that the Petitioner had never even read the novel "Orgy Club" and therefore could not possibly have had actual knowledge of its alleged obscene contents. The Petitioner didn't even recall ever seeing the novel "Orgy Club" before the police had actually seized it, and placed him under arrest (R. 176-177). It was after this testimony that the court denied the Petitioner's renewed motions for a directed verdict (R. 243, 320). The court instructed the jury (R. 333-335), that it could infer this knowledge of obscenity and further that a book dealer was under a duty to refrain from selling questioned material and the book dealer should actually destroy any questioned material. When the jury requested

clarification of the court's charge on this point, the court denied the Petitioner's suggested charge No. 4 (R. 349), which would have instructed the jury that knowledge of obscenity could be inferred to a book dealer only in the content of a patently offensive book. The court went on to recharge the jury (R. 351-353), that the Petitioner's statement, that he did not know what was in the book, "Orgy Club" that he handled, was not an absolute excuse if the jury believed that he should have known what was in this book. The Petitioner argues to this Court that such an instruction to the jury is repugnant to the First Amendment to the Constitution of the United States of America, since it places the burden upon every book dealer to read every novel, before he could offer it for sale with impunity. This restriction must suppress literary material which is not obscene, since no book dealer could possibly read every novel that would be offered for sale. To permit this type of a conviction to stand will strike the greatest blow against freedom of speech and press since the adoption of the First Amendment of the Constitution of the United States of America. Every corner drugstore in the United States that carries paperback novels or pocket book novels could be gutted by the censors, and the owner, or manager, indicted for possession of alleged obscene literature. This Court in *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205, spawned the rule of law requiring knowledge of obscenity to obtain a conviction, stating that circumstances may warrant the inference that a book dealer was aware of the contents of a book despite his denial. If a book is not patently offensive, to put a book dealer upon notice that its contents are, or may be; obscene, an un-constitutional burden would become the yoke of every establishment which dares to risk imprisonment by selling a sixty cent paper back novel. There is another aspect to be considered in the event this Court should permit this conviction to stand. If the burden is placed upon every book dealer, including the proprietor of every corner newsstand or local drug store in the United States that carrier paper

back novels or pocket books, to read every novel or pocket book that is not patently offensive, if said novel, or pocket book does not bear the reputation of being "dirty," then aside from the censorship imposed by the physical limitation on the ability of the book dealer, or manager of the local drug store, to read all of this material, the additional element of censorship through the individual taste of the proprietor of the newsstand, or local drug store, would set the limits of availability of literature to the general public. The First Amendment will not suffer this intolerable limitation on the freedom of the press and speech to be allowed, *Mishkin v. New York, supra*, at 511:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

CONCLUSION

Thereupon, this Court, in consideration of the three points set forth in this Petition should grant a Writ of Certiorari to the Supreme Court of the State of Ohio and reverse the conviction of Louis Mazes.

Respectfully submitted,

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, NO. 9482

STATE OF OHIO,
Plaintiff-Appellee,

v.

LOUIS MAZES,
Defendant-Appellant.

OPINION
April 5, 1965

APPEAL ON QUESTIONS OF LAW
FROM COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Messrs. Raymond E. Shannon and Michael M. Nikolin, for Plaintiff-Appellee,

Mr. Allen Brown, for Defendant-Appellant.

HOVER, J.

Defendant below appeals, on questions of law, his conviction in the Common Please Court of the offense of knowingly possessing an obscene book entitled "Orgy Club", contrary to the provisions of Section 2905.34 of the Revised Code of Ohio. He sets out some forty-seven assignments of error, most of which are duplicated and overlapping. Trial was had before a jury and the matter comes into this Court upon the transcript of the docket and journal entries, the bill of exceptions and [4a] exhibits in the trial proceedings, and the briefs and arguments of counsel.

Argument was deferred pending a decision by the Supreme Court of the United States in *Jacobellis v. Ohio*, 378 U.S. 184, in which the court was concerned with the constitutionality of the Ohio statute above, and the legality and sufficiency of the proof offered in support of the offense in the hope that some light would be shed upon the constantly recurring questions arising in this always difficult field. The hope was not fulfilled.

Although the conviction in Jacobellis above was reversed, the diverse reasons offered by the concurring justices for the reversal do not give rise to any new rule of law in this field. As observed editorially in the report of this case in 12 L. Ed. 2d 973, "The six justices voting for reversal were unable to agree upon an opinion in support of the decision". Even the epitomized decisions in the above report indicate five drastically different sets of reasons for either affirmance or reversal. The net result is, in respect of the constitutional aspects of the particular Ohio statute, that the definition of obscenity and the rule for its determination remains as laid down in the Roth-Alberts cases, 354 U.S. 476, as follows: "* * * whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest". This identical standard, subsequent to the decision of Roth above, was carried into the statutory law of Ohio and was the standard upon which the court below properly charged the jury in this case.

The appellant, in a variety of ways, by his assignments of error, raises the question of whether or not in this trial and in view of [5a] the evidence received, the requirement that the defendant "knowingly" possessed an obscene book was satisfied. This scienter is a specific element of the offense. Without substantial evidence in support of it, the conviction may not stand. See *Smith v. California*, 361 U.S. 147; *Cincinnati v. Marshall*, 172 O.S. 280; *State v. Wetzel*, 173 O.S. 16; *State v. Warth*, 173 O.S. 15; and *State v. Griffith*, 174 O.S. 553.

On this question the Supreme Court of Ohio observed in its opinion in the Jacobellis case above (173 O.S. 22): "A commercial possessor (such as the bookstore operator here) obviously cannot be held to the duty of examining and determining for himself the obscenity of all matters which pass through his hands, neither, however can he profess ignorance of that which has become a matter of general knowledge in the community. * * * Thus it is only when a holder of such matter becomes aware of or *should be aware of the contents* and the objectionable nature thereof that he would become liable to prosecution under this section". (Emphasis added.)

Accordingly, it becomes necessary to examine the evidence available to the jury in respect of "knowledge" to determine whether or not it was sufficient to justify by inference or otherwise the conclusion on the part of the jury that the defendant knowingly possessed the objectionable material.

The exhibit in question is a book called "Orgy Club". It is technically a novel; it was offered for sale in the defendant's store. An examination of it demonstrates conclusively that its dominant, if not sole, theme aside from a most tenuous plot, deals with constant, casual and [6a] colorful fornication spiced here and there by bits of sadism.

The record shows the book was taken by police, after examination, from a display rack labelled "adults only". Whether this tag is a restriction or an invitation is unimportant. The store is small and crowded. The particular rack is within immediate reach of any part of it. The tag "adults only" obviously demonstrates a conscious classification of material on the part of the merchant. In addition to this, the exhibit was found in the midst of others hereinafter referred to which bear equally exotic titles and jackets announcing with crystal clarity that this is the sex, sin and sadism department. The titles obviously announce to the literary browser the sensa-

tional nature of the subject matter within arm's reach. This is recognized, good merchandising practice whether the merchant is selling housewares, food, clothing or literary erotica. It becomes patently absurd, however, for the merchant to thus engage in sound selling practices on the one hand and disclaim any knowledge of the content or subject matter of his wares on the other hand.

An examination of the photograph exhibits shows some titles and jacket "art" of the books for sale along with Orgy Club. The Court is not going to compound, abet or promote the merchandising of the defendant by detailing the suggested erotica, nor is it saying that the discernable list of books is necessarily obscene, but it is saying that the dealer is obviously making an intelligent and purposeful classification of subject matter.

Defendant proffered in evidence, which proffer was properly refused by the court, various widely read and widely accepted literary [7a] publications dealing incidently with sex in conceivably prurient aspects. He suggests that there is no difference between the proffered works and "Orgy Club" and its titled relatives. The very names of the books proffered contradict appellant's argument in this respect. In "Strange Fruit", "Memoirs of Hecate County", "From Here To Eternity", "Tortilla Flat", "A Rage To Live", "Brave New World", "Ulysses", "Daughters and Mothers", "Another Country", "The Tin Drum", "Lady Chatterley's Lover", there is no way in which the bare title could suggest to the ignorant or unwary book dealer the nature of the included subject matter, much less its dominant theme. They indicate on the surface no common subject matter and suggest little, if any, particular content.

The problem of the book dealer in attempting to screen the extensive output offered him for display and sale is recognized as a difficult one; however, it takes no effort whatsoever, during the course of a fifteen second read-

ing either of the back cover or the front page of "Orgy Club" to indicate an appeal to pruriency as the dominant theme.

These aspects of the evidence received by the jury in this trial are more than sufficient to justify its necessary conclusion of "when a holder of such matter becomes aware of or should be aware of the contents and the objectionable nature thereof that he would become liable to prosecution under this section", as stated on page 27 in *State v. Jacobellis* above.

This Court finds itself in agreement with the words of Chief Justice Warren in *Jacobellis v. Ohio* above, that "once a finding of obscenity has been made below under a proper application of the Roth test, [8a] I would apply 'a sufficient evidence' standard of review — requiring something more than merely any evidence but something less than 'substantial evidence on the record (including the allegedly obscene material) as a whole'."

In this case the Roth test was properly given to the jury and apparently applied by it with, in addition, sufficient evidence before it that the defendant knew or should have been aware of the objectionable nature of the contents of the principal exhibit.

The court below properly overruled defendant's motion to suppress "Orgy Club" as evidence because of the manner of seizure by the arresting officers. They took the book in good faith as contraband after examination and after a determination that its possession then and there constituted a felony in being.

Defendant also complains of the simultaneous seizure of other and possibly similar items from his stock of merchandise. Certain of this additional material was offered in evidence by the state and refused by the court as being irrelevant and immaterial to the charge being tried. This was correct, and whatever property of the defendant was taken is not a part of the record of this

case and its manner of taking is not in issue here. What ever remedy the defendant may have for the alleged wrongful taking of his property, it is not the right to a new trial in this case.

Accordingly, the judgment below is hereby affirmed.

HILDEBRANT, P. J. and LONG, J., CONCUR.

SUPREME COURT OF THE STATE OF OHIO

1966 Term

STATE OF OHIO,
Plaintiff-Appellee,
vs.
LOUIS MAZES,
Defendant-Appellant.

No. 39520

Obscene literature—Possessing, exhibiting and selling prohibited—Section 2905.34, Revised Code—Elements necessary to render publication violative of statute.

In order that a publication may be held to be in violation of Section 2905.34 of the Revised Code, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. (*A Book v. Attorney General of Massachusetts*, 16 L. Ed. 2d 1.)

(No. 39520—Decided July 13, 1966.)

Appeal from the Court of Appeals for Hamilton County

The appellant is an operator of a newsstand, candy and tobacco store in the suburb of Clifton, of the city of Cincinnati. This store enjoys a good reputation in the community.

On the morning of November 7, 1962, several officers of the Vice Control Bureau of the city of Cincinnati Police Department entered the premises. One of the officers took a book, "Orgy Club," from an open bookrack where it was on display. He read the flyleaf and excerpts from about four pages chosen at random and thereupon

seized the book and placed appellant under arrest for an alleged violation of the provisions of Section 2905.34 of the Revised Code of Ohio.

Numerous other books were on display on the bookrack. Testimony was offered by the appellant that the books including "Orgy Club" were delivered to the premises by the supplier and placed on the racks in the store that were likewise provided by the supplier. The appellant knew of the book, "Orgy Club," and knew that it was on display to the public on the bookracks in his store.

Appellant was in control and possession of the questioned book.

Appellant was indicted by the Hamilton County Grand Jury, brought to trial and convicted. His conviction was affirmed by the Court of Appeals.

Allowance of appellant's motion for leave to appeal brings this cause before this court for review and final disposition.

Mr. Melvin G. Rueger, prosecuting attorney, and *Mr. Michael N. Nikolin*, for appellee.

Messrs. Brown, Schulzinger & Immerman, Mr. Allen Brown and *Mr. George C. Katsanis*, for appellant.

Herbert, J. A casual glance at the specimen of nudity displayed on the front cover and the depraved sex comments on the back cover of the book, "Orgy Club" (see *Ginzburg v. United States*, ___ U.S. ___, 16 L. Ed. 2d 31) appears sufficient to bring notice to appellant that he had in his possession and was offering for sale a book that was in [probable] violation of the provisions of Section 2905.34 of the Revised Code.

The obscene material found between the covers, viewed from any standpoint, is utterly without redeeming social value.

A Book v. Attorney General of Massachusetts (March 21, 1966), 16 L. Ed. 2d 1, lays down three principles applicable to the case at bar:

"* * * three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Each of the foregoing elements is applicable to "Orgy Club."

Therefore, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

Taft, C. J., Zimmerman, Matthias, O'Neill, Schneider and **Brown, JJ.**, concur.

Schneider, J., concurring. The indictment in this case charges an offense under Section 2905.34, Revised Code. It is an offense under that section to "exhibit* * * in a place which may be within the view of a minor, any" book as described in the opinion of the court.

The evidence is undisputed that at the time the book was seized and the defendant was arrested, the book was on a rack on which a sign was placed reading, "You must be over 21 to purchase one of these books." However, the arresting officer testified, without objection, that "there were several young boys in the store" looking at the rack. This fact is uncontroverted.

In addition, the prosecuting attorney was permitted to argue that the jurors should consider whether they would allow the book to be seen by their children. Appellant now contends that that argument was erroneous, but he makes no claim that an objection thereto was interposed instanter. Furthermore, none of the arguments are a part of the record, and, therefore, any claimed error contained therein will not be considered on review.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1966 Term

To wit: Wednesday, September 28, 1966

State of Ohio,
Plaintiff-Appellee,

v.

Louis Mazes,
Defendant-Appellant.

No. 39520
REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Jounral No. ____ Page ____.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 28th day of September, 1966.

THOMAS L. STARTZMAN
Clerk

JURY CHARGE
September 27, 1963

THE COURT: Now, ladies and gentlemen of the jury, you have heard all of the evidence in this case and the arguments of counsel. It now becomes my duty and obligation to instruct you in reference to the rules of law which are to govern you in your deliberations of this case.

At the outset, may I remind you, and I think I have indicated this to you before, that the opening statements of counsel which were given last week are not evidence in the case. They were made for the purpose of giving you their ideas as to what the evidence would disclose. Likewise, their closing arguments which you heard yesterday and this morning are not evidence in the case. They are merely a summation of what counsel believed you heard by way of evidence, and any reasonable inferences which they felt necessarily could be drawn from the evidence presented to you.

Now, during this trial there have been numerous occasions in which counsel for either side have objected to certain testimony, and the Court has been called upon to rule upon those objections. There might have been certain comments between counsel, or between either both counsel and the Court upon ruling on these matters. You are to draw no inferences from [326] any comments between counsel or counsel and the Court.

As you well know, this case arises from the fact that the Hamilton County Grand Jury has returned an indictment charging, in substance, this defendant with the crime of possessing obscene literature. To this indictment the defendant has pled not guilty. This places in issue all of the material allegations of this indictment. I must instruct you that the fact that an indictment has been returned in this case raises no presumption of guilt on the part of this defendant. Under our system of law, any defendant, and this defendant in this case, is presumed to

be innocent until and unless evidence is introduced which convinces you beyond a reasonable doubt of his guilt.

Now, this term "reasonable doubt" has been used by counsel, and I believe the Court, in this case. There is a duty upon the Court to define the term "reasonable doubt" to you as the legislature has interpreted it, and "reasonable doubt" is defined as follows:

"It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

[327] So, in general, ladies and gentlemen, in this case as in every criminal case, it is incumbent upon the State of Ohio to introduce evidence which convinces you beyond a reasonable doubt of the guilt of this defendant.

Now, in this case, as in most cases, there has been two kinds of evidence submitted for your consideration. These are known as direct and circumstantial evidence. There is no difference between direct and circumstantial evidence as far as its convincing possibilities. However, direct evidence is defined as follows:

"If a witness says or testifies to the commission of an ultimate fact which is to be proven in a case, that would constitute positive or direct evidence." However, as you know, it is not always possible to establish ultimate facts by such direct or positive testimony, nor is it necessary to do so.

Circumstantial evidence, on the other hand, is "Proof of facts standing or existing in such relation to the ultimate fact or facts to be proven that such ultimate facts may be inferred or deduced from such surrounding facts." However, it should be remembered that before there can be any legal conviction of a defendant; the evidence, whether it be direct or circumstantial, must be

so clear and so convincing as to exclude from your mind and the minds of each of you any reasonable doubt of the guilt of the defendant.

Now, in this case, ladies and gentlemen, you are the [328] sole judges of the facts and the credibility of the witnesses. By that is meant that merely because a particular individual raises his or her hand and swears to tell the truth is no reason that you necessarily must believe that person or the story that he relates. You have a perfect right to consider the witnesses demeanor on the stand, whether perhaps he is related to any of the parties involved, either by blood or marriage, whether or not the story he tells is logical, whether he has an interest in the outcome of this particular lawsuit, whether or not his story is corroborated by other witnesses or other testimony; and you may, in fact, believe all that a witness says to you, you may disbelieve it, or you might believe part and disbelieve part.

You may apply these tests which I have suggested to you, or any others which you have found effective in your past experience in determining what weight or what credit you will give to the testimony or the words of your fellow human beings.

Likewise in this case, there has been what has been called "expert testimony." Ordinarily the Court only permits persons to testify as to things which they of their own knowledge have seen or experienced or know, but certain persons are permitted to give what is known as "opinion testimony" which may be based upon hypothetical facts or things of that nature. These particular individuals, because of their training or education or background or experience, are better qualified on [329] certain subjects and in certain fields than the ordinary layman, and the Court permits these types of individuals to give their opinion as to certain questions. Now, in evaluating this expert testimony, you may consider that particular expert's background by way of training or experience, whether or not you feel that it justifies weight and credit to be applied to the opinion as it has been giv-

en to you, and you may decide what weight and what credit to give to this expert testimony, just the same as you do to ordinary lay witnesses.

Further, there has been testimony permitted in this case in reference to the character and reputation of this defendant. This is perfectly proper. In simple language, character means what a person is or actually is, and reputation is what other people think about the particular individual. The Court, as you know, has permitted that type of testimony, and the evidence in this case has been offered by the defendant upon the assumption that one of good character is less likely to commit a crime than one not of good character. However, this evidence is to be received by you and considered by you along with all the other evidence in the case, and to be given such weight and consideration as you think it is entitled to, in connection with all of the other facts and circumstances in the case in arriving at a determination of the guilt or innocence of the defendant. If so considered along with all of the other evidence it appears that the evidence shows the [330] guilt of the defendant beyond a reasonable doubt, then his good character and reputation will not avail him and entitle him to an acquittal. Good character and reputation is never a defense to a crime, but it is evidence which must be considered by you in connection with all of the other evidence for the purpose of determining whether the proof taken as a whole establishes the guilt of the defendant beyond a reasonable doubt.

Now, in this particular case, this indictment which I have referred to which has been returned by the Hamilton County Grand Jury is based upon a violation of the statute which is Section 2905.34, and I will read a part of that section to you which is pertinent to the facts in this particular case, and that section reads as follows:

"No person shall knowingly sell, or have in his possession or under his control an obscene, lewd, or lascivious book, magazine . . ." and other types of writing, and this section makes such possession a violation of law.

Now, as can be seen, ladies and gentlemen of the jury, under that section the state is called upon to prove certain elements of this particular crime. First of all, it is incumbent upon the State of Ohio to prove that this offense occurred in Hamilton County, Ohio; secondly, that it occurred on or about the date named in the indictment; thirdly, that this was unlawfully done; fourthly, that it was knowingly done, and then that this defendant was the one who had in his possession [331] or under his control the alleged obscene, lewd or lascivious book. All of these elements must be proven beyond a reasonable doubt.

If in the consideration of this case any one of these elements are found not to be proven beyond a reasonable doubt, then even though some of the others had been proven beyond a reasonable doubt, it would be your duty to acquit the defendant.

Now, in the use of some of these terms I think that I should define them to you. The statute uses the words "obscene, lewd or lascivious book" and so forth. I think that a definition of the word "lewd" can be given as: "Indecent; lustful; unchaste; or lascivious."

The term "lascivious" is defined as "Wantonness, characterized by or expressing lust or lewdness; tending to cause or excite lustful desires."

"Lust" may be defined as "Excessive sexual desire, especially as seeking unrestrained gratification." The term "obscene" has been defined by our legislature, and they have given this definition, which numerous times has been repeated to you by counsel in this case, and, again, I want to remind you that this is the statutory definition of obscenity, and it reads as follows: "A newspaper, magazine or other publication is obscene if to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."

[332] This involves the use of the word "prurient." Now, "prurient" in my opinion may be defined as follows:

"To itch or to long for a thing; be lecherous; to have lustful ideas or desires; lustful; lascivious; lewd; itching; longing; uneasy with desire or longing; having morbid or lascivious longings of desire; curiosity or propensity; lewd."

I think this gives you a test whereby you may apply one of the elements which is necessary to be proven in this case, as to whether this exhibit which has been introduced in evidence is obscene. If you find from a consideration of all of the evidence in this case that it is obscene, then, naturally, it would be incumbent upon you to discover whether or not this defendant knowingly had in his possession or under his control this particular volume.

Now, in determining this question, ladies and gentlemen, there is no question that this act is made one which is unlawful by the State of Ohio. The question as to whether or not this defendant had in his possession or under his control is one which you may consider not only from anything that he might have said or done, but the surrounding circumstances, and all of the facts, in determining whether or not this particular book was in his possession and under his control knowingly.

You will see in applying this test that the test for obscenity is not subjective, but objective. It is not to be judged by what any certain individual might deem to be [333] obscene, or what a particular group of individuals might consider to be obscene, but rather what the community as a whole, the average person in that community, would consider to be obscene.

The question naturally follows from that, to what extent is a person bound to have knowledge of the contents of some book or pamphlet which might be in his possession? A commercial possessor, obviously, cannot be held to the duty of examining and determining for himself the obscenity of all matters which pass through his hands. Neither, however, can he profess ignorance of that which has become a matter of general knowledge in the community. The rule of reason must be applied in

all of these matters. While the possessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene as judged by the tests which I have given you, then there is a duty which devolves upon the holder of such publications to refrain from distributing them or exhibiting them, and to destroy them as soon as he may practically do so. Otherwise, he would become guilty under this section.

Thus, it is only when a holder of such matter becomes aware of it, or should be aware of the contents and the objectionable nature thereof, that he would become liable to prosecution under this section.

This phrase, "knowingly possess," as it is used in the [334] criminal statutes of Ohio, and of course this is one of them, is implicit not only the element of scienter but also the element of mens rea, namely, "a guilty or wrongful purpose." It is not conceivable that a violation of this section is committed the moment an individual discovers that a book or something of that nature in his possession is obscene. He could only be said to violate the law when and if he forms the purpose to use, exhibit or sell it wrongfully, in other words, forms the intent or makes up his mind to continue the possession or the offering for sale of such a book or pamphlet, having mentally determined that it was obscene.

Now, in considering all of these questions, it is necessary for you to determine, and you have a perfect right to consider all of the circumstances which the Court has permitted counsel to show in reference to this particular bookshop; how it was operated, who was in control of it, all of those things, and of every nature, in determining what reasonable inferences you may draw as to the operation by this defendant in this particular shop.

If you find from a consideration of all of this evidence that this offense occurred in Hamilton County, Ohio, on or about the date named in the indictment, that this particular instrumentality was obscene, as the definition of "obscene" was defined to you, and that this defendant

knowingly was in possession of this book, that all of these elements were [335] proven beyond a reasonable doubt, it would be your duty to convict this defendant.

If, on the other hand, any of these elements have in your opinion failed to be proven beyond a reasonable doubt, it is equally your responsibility to find this defendant not guilty.

Now, in making up your minds in this case you are not in any way to consider any possibility of punishment or penalty which might arise or be imposed in the event that your verdict is one of guilty. You are in no way concerned with any such consideration, and you should not let it enter into any of your deliberations of this case.

When you retire to your jury room you will have with you the exhibits which the Court has permitted to be offered in evidence, and you will have the indictment in this case, which I again remind you is not evidence in the case. You will also have two forms of verdict, one finding the defendant guilty and the other finding him not guilty.

Since this is a criminal case, it requires the unanimous decision of this jury. By that I mean that all 12 of you must agree upon whichever is your verdict. When you retire to the jury room your first duty will be to select one of your number to serve as foreman or forelady, and that person will preside over your deliberations in the case. When you have agreed upon a verdict, all 12 of you must sign whatever is your [336] verdict, and your foreman will sign as foreman.

There are two exhibits, one in reference to the license and one in reference to the personal property tax, and these two exhibits are only to be considered by you in determining the ownership of this establishment. Any other information involved in those two exhibits is not to be considered by you.

Is there anything that counsel wants to call to my attention?

(Counsel for the State of Ohio and the defendant approach the bench and confer with the Court outside the hearing of the jury.)

THE COURT: Ladies and gentlemen, there is one other thing I would like to call to your attention, and that is that courts have been established to do justice between parties according to law. Some two weeks ago when you raised your hands to sit and truly try this case you took an oath to truly and fairly determine the issues in this matter, and you should let no other consideration, either bias or prejudice or sympathy for or against the defendant or for or against the State of Ohio enter into your deliberations. You should base your judgment solely and exclusively on the evidence and testimony which you have heard, and the rules of law which I have tried to give you.

Let your verdict respond to the oath which you took.

[337] You 12 folks are now excused. You may retire to the jury room. When you have agreed upon a verdict, make that fact known to the bailiff and return it to open court.

(Thereupon, at 9:40 a.m., the jury retired to the jury room to begin deliberations. The thirteenth juror was excused by the Court.)

THE COURT: Let the record show that I permit both of you, the defendant and the State of Ohio, a general exception to the charge.

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(Thereupon, at 11:30 a.m., the jury transmitted through the bailiff the following message to the Court:

"We would like to have reread the portion of the law pertaining to knowingly being in possession of obscene literature.

"Also, Mr. Mazes' testimony as to knowledge and contents of his store."

The jury returned to open court at 11:35 a.m., and, all parties being present, the following proceedings were had:)

THE COURT: Now, ladies and gentlemen of the jury, I understand that you have requested two questions of the Court, one in reference to Mr. Mazes' testimony and part of the Court's charge.

[338] As a matter of fact, it will take some time to prepare this for you, and the Court is faced with a situation in which I have to be in a joint session at twelve o'clock, which will probably last an hour, and the reading of this testimony would take longer than twenty minutes, I am going to suggest at this time, if you will, that you be excused at this time to go to lunch, and I will ask you to be back here at about 1:15. Would that give you enough time for your lunch?

At that time the court reporter will have the information and we will answer your questions at that time, and then you can resume your deliberations.

I want to make one other thing very clear to you. You do not have to stay together while you go to lunch. You may go wherever you care to for lunch, but during this period while you are apart and not deliberating, you are not to talk to anyone about this case or permit anyone to talk to you about it. Likewise, if two or more of you go to lunch together, this is not the time for those folks to talk about this case or discuss how you feel about it, or the evidence or anything else involved in it. You should only discuss this matter when you return to your jury room and all 12 of you are once more together.

Is that clear to all of you? All right, you may be excused now, members of the jury, until 1:15 this afternoon.

(Thereupon, at 11:40 a.m., the jury was excused, to return to open court at 1:15 p.m.)

[339] AFTERNOON SESSION

(Thereupon, at 1:15 p.m., the jury and all parties present, the following proceedings were had:)

THE COURT: Now, ladies and gentlemen, I have your question which reads: "We would like to have reread the portion of the law pertaining to knowingly being in possession of obscene literature. Also, Mr. Mazes' testimony as to knowledge and contents of his store."

Now, the Court, with the help of the reporter, will have him read to you, first, all of what the Court gave you as the definition of "knowingly being in possession of

obscene literature," which I believe covers the first part of your question, and because it is impossible to pick out from the testimony of Mr. Mazes what questions and what answers were given on this particular subject that you are interested in, I will have the reporter read his entire testimony to you.

You may proceed, Mr. Finstad.

(Thereupon, the court reporter read to the jury the portion of the charge which begins with the last paragraph appearing on page 332 of this transcript and concluding with the words "having mentally determined that it was obscene," appearing on page 334 of this transcript.)

(The reporter then read the testimony of the defendant, Louis Mazes, in its entirety.)

[340] THE COURT: Now, ladies and gentlemen, I hope that answers the questions you asked of the Court. You may now retire and resume your deliberations of this matter. You are excused.

(Thereupon, at 2:00 p.m., the jury retired to the jury room to resume deliberations.)

(At 4:10 p.m., the jury returned to open court, all parties present.)

THE COURT: Now, ladies and gentlemen, I know that you haven't agreed upon a verdict at the present time, so I am going to dismiss you for now and you may go home at this time. I am going to ask you to come back on Monday, at which time you can resume your deliberations in this matter. I will ask you to be here at nine o'clock on Monday.

As you understand, during this weekend period you are not to discuss this matter with anyone, either your family or any of your friends, or if two of you happen to meet that is not the time to deliberate on this case. Do you all understand that? On Monday morning, though, when you come back, you will all assemble, and as soon as the twelve of you are present here at nine o'clock you may resume your deliberations.

You are excused now until nine o'clock Monday morning.

(Thereupon, the jury was dismissed at 4:15 p.m., to return and resume deliberations at 9:00 a.m., Monday, September 30, 1963.)

[341] MONDAY, SEPTEMBER 30, 1963

(Thereupon, at 9:00 a.m., the jury resumed their deliberations in this case.)

(At 10:10 a.m., the jury transmitted through the bailiff the following message to the Court:

"Please reread the law for us with special emphasis on the portion regarding a vendor's knowledge or lack of knowledge of the contents of obscene literature.

"Please reread the law for us."

(At 10:30 a.m., the jury returned to open court, all parties present.)

THE COURT: Good morning, ladies and gentlemen.

I have received two questions from you, which I assume are alternative in nature. You would like specifically the part of the charge read in reference to this one question of the vendor's knowledge, or else you would like to have the entire charge read.

Naturally, ladies and gentlemen, I don't have to remind you that all of the charge is equally important. The Court in no way tried to emphasize one element more than another. Counsel and I have checked with the reporter, and I am going to have him read one part of the charge to you again, which I think covers your first question, and if it does not you just let me know.

Will you please read the part that we have discussed?

[342] (Thereupon, the court reporter read to the jury the portion of the charge beginning with the first full paragraph appearing on page 330 of this transcript and concluding with the words "having mentally determined that it was obscene," appearing on page 334 of this transcript.)

THE COURT: Does that answer your question as far as the portion of the charge which you were interested in?

(All members of the jury respond affirmatively.)

THE COURT: All right. You may be excused and resume your deliberations.

(The jury returned to the jury room to resume deliberations at 10:45 a.m.)

(At 11:20 a.m., the jury transmitted through the bailiff the following message to the Court:

"Will you please type the portion of the charge that was just read to us and allow us to have it in the jury room?")

(At 11:30 a.m., the jury returned to open court, all parties present.)

THE COURT: Ladies and gentlemen, I have your request asking that the Court have this portion of the charge which was read to you typed up and allow you to have it in your jury room.

I am sorry, ladies and gentlemen, but I do not consider that that would be proper, or that I could do that. [343] However, I will ask you, if you didn't understand the court reporter as he read it to you, I will have it read to you once again. I don't believe I can properly have it written up just as a portion of the charge and have it submitted to you.

Do you want it read to you again?

JURY FORELADY GLADYS GIBERT: Yes.

THE COURT: Mr. Reporter, if you will go back and read the part you just did recently, and read it slowly, we will have that done. If there is any part that you don't hear, members of the jury, please let us know.

(Thereupon, the court reporter again read to the jury the portion of the charge beginning with the first full paragraph on page 330 of this transcript and concluding with the words "having mentally determined it was obscene," appearing on page 334 of this transcript.)

THE COURT: Does that answer your question?

JURY FORELADY GLADYS GIBERT: Yes.

THE COURT: You may resume your deliberations.

(The jury returned to the jury room to resume deliberations at 11:45 a.m.)

MR. BROWN: Let me have an exception to the reading of the charge and the conduct taken in answer to the jury's questions, it being orally read by the court reporter.

(The jury returned to open court at 12:15 p.m., all parties present.)

[344] THE COURT: Now, ladies and gentlemen, I know that you have not agreed upon a verdict as yet, but you have been working since nine o'clock this morning, and I thought perhaps this would be a proper time to permit you to go to lunch. May I ask you, members of the jury, how long you would like to have for lunch? I will try to work this out with you. Would 1:30 be time enough for you, or do you want longer?

JURY FORELADY GLADYS GIBERT: An hour is long enough.

THE COURT: All right. If you will all come back at 1:15, you may resume your deliberations.

Now, I think I made this clear to you yesterday, or Friday, that during the time that you are at lunch, if two or more of you are together, don't discuss this case or deliberate on it among yourselves. That should only be done in your jury room when all twelve of you are present. Naturally, don't talk to anyone else about the case while you are having your lunch.

If you will be kind enough then to come back at 1:15, when all twelve of you are once more together in the jury room, you may resume your deliberations. You are excused.

(Thereupon, at 12:15 p.m. the jury was excused for lunch. The jury resumed deliberations at 1:15 p.m.)

(At 3:30 p.m., the jury transmitted through the bailiff the following message to the Court:

"We would like the portion of the charge reread beginning with the statute, alleging the crime involved, [345] including the definitions, and that portion of the charge that was read to us this morning, and beyond to conclusion."

(At 3:40 p.m., the jury returned to open court, all parties present.)

THE COURT: Members of the Jury, I have your request here, and as I interpret your request you wish to have the portion of the charge read from where this particular crime is defined to the end of the charge.

Is that approximately what you want?

JURY FORELADY GLADYS GIBERT: Yes.

THE COURT: All right. The court reporter will read it to you.

(Thereupon, the court reporter read to the jury the portion of the charge beginning with the first full paragraph appearing on page 330 of this transcript and through the balance of the charge.)

THE COURT: Does that cover the part that you are interested in?

(Jury responds affirmatively.)

THE COURT: All right. You are excused now, members of the jury. You may retire to the jury room and resume your deliberations.

(Thereupon, at 3:55, the jury retired to the jury room to resume their deliberations.)

[346] (At 4:15 p.m., the jury transmitted through the bailiff the following message to the Court:

"Some of us understand that claiming lack of knowledge of the contents of an obscene book does not excuse the vendor.

"We have the problem of an individual or individuals claiming a person cannot be guilty of possessing obscene literature unless it has been proven he has knowledge of the contents."

At 4:20 p.m., the jury returned to open court, all parties present.)

THE COURT: Ladies and gentlemen, in reference to your last question which you have asked of the Court, I intend to try and answer your question, but because it is so late this afternoon I am going to permit you to go

home at this time and ask you to come back tomorrow morning, at which time I will try to answer this question you have propounded to the Court.

The same injunction applies at this time as it did, of course, over the weekend. You are not to discuss this case with other members of your family or indicate how you feel about the case, or anything of that sort, until tomorrow morning when you all return.

I will ask you to please come in at nine o'clock, and I will attempt to answer your question at that time, [347] and you may then resume your deliberations.

You are excused until nine o'clock tomorrow morning.

(Thereupon, at 4:25 p.m., the jury was excused, to return at 9:00 a.m., Tuesday, October 1, 1963.)

(The following proceedings were had outside the presence of the jury:)

MR. BROWN: May I approach the Court?

In view of the repeated questions that have been asked by the jury on the question of knowledge, I suggest to the Court that the proper instruction should be as follows:

(1) Knowledge, as used in this statute, requires proof of the following elements: Knowledge of the fact of possession; Knowledge of the obscene nature of the book; A malicious intent to possess it with knowledge of it being an obscene book.

Then the Court could proceed to the language which he is using quite correctly.

MR. NIKOLIN: I think Your Honor has already covered that.

THE COURT: I think I have, too. I will try and answer their question in the morning.

(Thereupon, the trial of this case was adjourned at 4:30 p.m., to resume Tuesday, October 1, 1963, at 9:00 a.m.)

[348] TUESDAY, OCTOBER 1, 1963.

(Thereupon, at 9:00 a.m., the following proceedings were had outside the presence of the jury:)

MR. BROWN: I wish to offer the following suggested charges to the Court, and ask that the jury be so charged:

SUGGESTED CHARGE NO. 1

The Act requires knowledge. The question, of course, is knowledge of what? It is apparent that such knowledge must necessarily relate to knowledge of the obscenity of the contents of the publication involved. In this case "knowingly" in the statute relates not merely to possession and control of the book, but also to what is in it and an awareness of the obscenity of the same.

SUGGESTED CHARGE NO. 2

Proof of knowledge on the part of the defendant as to the obscenity of the contents of the publication must be established beyond a reasonable doubt.

SUGGESTED CHARGE NO. 3

Knowledge as used in the context of the Ohio Revised Code 2905.34 means three separate and distinct things. It means: (1) Knowledge of the fact of possession. (2) Knowledge of the obscenity of the contents of the book. (3) An intent to possess the book as obscene, knowing it to be obscene.

[349] SUGGESTED CHARGE NO. 4

A commercial possessor obviously cannot be held to the duty of examining and determining for himself the obscenity of all matters which pass through his hands. Neither, however, can he profess ignorance of that which has become a matter of general knowledge in the community. The rule of reason must be applied in these matters. While the possessor should not be held to the impossible, where the contents of the given publication involved in this case have become a matter of common knowledge and are generally known to be obscene, then you may impute to the holder of that given publication knowledge of its obscenity. Or where all the surrounding circumstances are such, to-wit: such patent obscenity that it is immediately recognizable without considering the book as a whole, then you may impute knowledge.

SUGGESTED CHARGE NO. 5

Sexuality is not in and of itself obscenity and knowledge of patent sexuality is not necessarily to be equated with knowledge of obscenity unless all the surrounding

circumstances are such as to indicate beyond a reasonable doubt the knowledge of obscenity itself existing. Thus it is to be seen that the test for determining knowledge of obscenity by surrounding circumstances is not subjective, but objective. It is not to be judged by what any single individual deems to be sufficient to himself to suggest a possibility of the existence [350] of obscenity, but rather that which to the community as a whole patently suggests the existence of obscenity. "Patently suggests" means that which at a glance fulfills the elements of obscenity, and I have otherwise defined the elements of obscenity.

THE COURT: I will refuse to give the suggested charges, Mr. Brown. You may have an exception.

MR. BROWN: I wish to proffer them into the record.

(The suggested charges were proffered into the record by counsel for the defendant.)

THE COURT: You may bring in the jury.

[351] (Thereupon, at 9:15 a.m., the jury and all parties present in open court, the following proceedings were had:)

THE COURT: Good morning, ladies and gentlemen of the jury.

Now, yesterday, ladies and gentlemen, you asked the Court another question, and it seems to the Court that the problem which is troubling you in this matter is the subject of the defendant knowingly having in his possession the alleged book. The Court is going to try and further explain this question to you in an effort to assist you in arriving at a decision in this case.

Now, this phrase "knowingly has in his possession," members of the jury, as I indicated to you, involves the question of criminal intent on the part of the defendant. Now, as I indicated to you, intent is a mental process on the part of the individual. It is, of course, difficult for any of us to look into another person's mind and determine what is going on in that other person's mind; however, you have a right to consider on this question any-

thing that the individual might have said or done, or the surrounding circumstances which might indicate to you what actually was going on in the mind of the defendant.

You can consider, as I have defined to you, not only direct evidence, but circumstantial evidence in reference to this issue. You certainly have a right to consider the entire circumstances which have been presented to you by testimony in [352] this case.

You have a situation here where the defendant is a commercial possessor of these books for sale to the public, and as I indicated to you before in my general charge, you have to apply a rule of reason in determining what his intent was. Naturally, it would be impossible for you to believe that a person under these circumstances is charged with the knowledge of the contents of everything that is in his store. On the other hand, you may consider that merely because he chooses to say or to act as if he doesn't know what is in the books which he handles is not an absolute excuse. You should consider all of the circumstances in determining whether he did actually know what was in the books or whether a reasonable person under the same or similar circumstances should have known what was in the books.

Now, in determining this question, though, it is incumbent upon you to find from all of the evidence that he had guilty knowledge of the contents of this book in question, namely, that he either actually knew that this book was obscene, as I have defined that term to you, or that he should have known that it was obscene. Further, from all of the circumstances, assuming that the book was obscene, whether he conscientiously made up his mind with a criminal knowledge or intent to either keep the book or display it or offer it for sale.

Now, these elements must be proven to your [353] satisfaction beyond a reasonable doubt as that term was defined to you, and if you find from all of the facts and circumstances that he did have knowledge, either constructively or actually, that this book was obscene, and that then he made up his mind to continue to possess it,

have it under his control, and offer it for sale with guilty knowledge and guilty intent, and those elements were proven beyond a reasonable doubt, then it would be your duty to convict the defendant.

If, on the other hand, you did not believe this element of knowingly with criminal intent has been proven beyond a reasonable doubt, equally, you will acquit the defendant.

I hope, perhaps, that this has cleared up some of the questions in your minds. You may now retire and resume your deliberations.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

MAZES *v.* OHIO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 896. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Ohio is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE HARLAN would grant the petition and set the case for oral argument on the Ohio statute.